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No. 04-

IN THE

Supreme Court of the United States

FRAN JONES,

Petitioner,

v.

ROCKDALE COUNTY, GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Rockdale County, Georgia entered into contracts with the State of Georgia Department of Transportation ("GA DOT") and others to widen a stretch of state route 20 that passes near Ms. Jones' residence and her once pristine private lake. During road construction, Rockdale County intentionally directed the polluted stormwater runoff from the road and the developing right-of-way into Ms. Jones' lake without her consent, without any Clean Water Act 33 U.S.C. §§ 1251 *et seq.* ("CWA") permits, and without a Resource Conservation Recovery Act 42 U.S.C. §§ 6901 *et seq.* ("RCRA") disposal permit. To this day, no permits have been obtained, many tons of the dumped materials remain in Ms. Jones' lake, and the polluted stormwater runoff from the widened road continues to be intentionally and illegally dumped into Ms. Jones' lake with every storm.

Four questions of great national importance are presented:

1. Whether only persons having authority to make "final decisions" about CWA and RCRA compliance have liability for CWA and RCRA violations.

2. When is a discharge "subject to" a CWA § 402 permit, and thereby excluded from the RCRA 42 U.S.C. § 6903(27) solid waste definition.

3. Whether RCRA's application and integration provisions at 42 U.S.C. § 6905 bar simultaneous citizen suits under RCRA and the CWA.

4. Whether the "Surprise" Alleged to Support an Exclusion of Evidence Under FRCP 37(c)(1) Must be Genuine and Justified.

LIST OF PARTIES

In addition to plaintiff Ms. Fran Jones, the other parties to the proceedings in the United States District Court for the Northern District of Georgia – Atlanta Division were the following defendants: Reynolds, Inc.; E.R. Snell Contractor, Inc.; State of Georgia Department of Transportation; J. Tom Coleman, Jr., in his Official Capacity as Commissioner of the Georgia Department of Transportation; and Rockdale County, Georgia. All of the Defendants except Rockdale County, Georgia have settled with Ms. Jones and been dismissed from the case.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	ix
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	1
Statement of the Case	8
Reasons for Granting the Petition	10
I. The Lower Courts' Opinions are Directly Contrary to the Plain Language of RCRA, the CWA, and Binding U.S. Supreme Court Precedent.	10
II. The Conflicting Federal Court Decisions Interpreting RCRA's Solid Waste Exclusion Perpetuate Great Uncertainty About What the Law Is.	13

Contents

	Page
III. The District Court and the Court of Appeals Have Failed or Refused to Interpret and Apply RCRA According to Its Plain Language. . . .	17
IV. A Defendant's Claimed "Surprise" Which Would Support Exclusion of Plaintiff's Evidence Under FRCP 37(c)(1) Must Be Genuine, Not a Fabrication, and Not the Result of Defendant's Willful Ignorance. . .	20
Conclusion	24

TABLE OF CITED AUTHORITIES

Page

Cases:

Buchholz v. Dayton International Airport, 1995 WL 811897 (S.D. Ohio 1995) 15

Carbone v. Town of Clarkston, 511 U.S. 383, 114 S. Ct. 1677 (1994) 10

Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., Inc., 989 F.2d 1305 (2d Cir. 1993) ... 19

Environmental Protection Agency v. California ex rel. State Water Resources Control Bd., 426 U.S. 200, 96 S. Ct. 2022 (1976) 13

Fishel v. Westinghouse, 617 F. Supp. 1531 (D.C. Pa. 1985) 16

Inland Steel Co. v. U.S.E.P.A., 901 F.2d 1419 (7th Cir. 1990) 16

Lutz v. Chromatex, Inc., 725 F. Supp. 258 (M.D. Pa. 1989) 15

Meghrig v. KFC Western, Inc., 516 U.S. 479, 116 S. Ct. 1251 (1996) 12

Morton v. Mancari, 417 U.S. 535, 94 S. Ct. 2474 (1974) 17

Radzanower v. Touche Rose & Co., 426 U.S. 148, 96 S. Ct. 1989 (1976) 17

Cited Authorities

	Page
South Florida Water Management District v. Miccosukee Tribe of Indians, 541 U.S. 95, 124 S. Ct. 1537 (2004)	10, 11, 13
State v. PVS Chemicals, Inc., 50 F. Supp.2d 171 (W.D. NY 1998)	15-16
U.S. Dept. of Energy v. Ohio, 503 U.S. 607, 112 S. Ct. 1627 (1992)	10, 11
United States v. Allegan Metal Finishing Co., 696 F. Supp. 275 (W.D. Mich. 1988)	15
United States v. Dean, 969 F.2d 187 (6th Cir. 1992)	16
United States v. Vineland Chemical Company, Inc., 692 F. Supp. 415 (D.N.J. 1988)	19
Water Keeper Alliance v. U.S. Department of Defense, 152 F. Supp.2d 163 (D. PR 2001)	15
Williams Pipeline Company v. Bayer Corporation, 964 F. Supp. 1300 (S.D. Iowa 1997)	16
Statutes:	
28 U.S.C. § 1254(1)	1
33 U.S.C. §§ 1251 *et seq.*	9
33 U.S.C. § 1311(a)	5

Cited Authorities

	Page
33 U.S.C. § 1342	5, 10
42 U.S.C. §§ 6901 *et seq.*	i, 9
42 U.S.C. § 6903(3)	1
42 U.S.C. § 6903(27)	*passim*
42 U.S.C. § 6905	i, 10, 17
42 U.S.C. § 6905(a)	2, 18
42 U.S.C. § 6905(b)	19
42 U.S.C. § 6905(b)(1)	3, 18, 19
42 U.S.C. § 6945(a)	3, 12
42 U.S.C. § 6972(a)(1)(A)	4, 12
42 U.S.C. § 6972(a)(1)(B)	4, 12

Cited Authorities

Page

Rules:

FRCP 26 .....6, 21, 22, 23

FRCP 37(c)(1) ..... *passim*

Regulations:

40 C.F.R. § 261.4(a)(2) 16

40 C.F.R. § 122.26 14

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Eleventh Circuit Dated And Filed September 8, 2004 ..... 1a

Appendix B — Order Of The United States District Court For The Northern District Of Georgia Atlanta Division Filed January 30, 2004 ..... 9a

Appendix C — Judgment Of The United States District Court For The Northern District Of Georgia, Atlanta Division Dated And Filed February 3, 2004 ..... 23a

Appendix D — Order Of The United States Court Of Appeals For The Eleventh Circuit Denying Petition For Rehearing Dated November 2, 2004 ..... 25a

Appendix E — Agreement Dated September 27, 1994 27

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Eleventh Circuit and the U.S. District Court for the Northern District of Georgia – Atlanta Division are unreported and are set forth in the Appendix to this Petition for Writ of Certiorari at Appendix A and B respectively.

STATEMENT OF JURISDICTION

On September 8, 2004, the U.S. Court of Appeals affirmed the Order of the U.S. District Court holding that simultaneous suits under RCRA and the CWA are prohibited, and that certain waste discharges are excluded from RCRA's solid waste definition by a CWA permit that was never sought or obtained, and that only persons with ultimate authority have liability for RCRA and CWA violations.

On November 2, 2004, the Court of Appeals denied Ms. Jones' timely Petition for Rehearing and Petition for Rehearing *en banc*. (App. D). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

– Federal Resource Conservation and Recovery Act –

42 U.S.C.A. § 6903(3)

> The term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or

hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

42 U.S.C.A. § 6903(27)

The term "solid waste" means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 1342 of Title 33, or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923) [42 U.S.C.A. § 2011 et seq.].

42 U.S.C. § 6905(a)

Nothing in this chapter shall be construed to apply to (or to authorize any State, interstate, or local authority to regulate) any activity or substance which is subject to the Federal Water Pollution Control Act [33 U.S.C.A. § 1251 et seq.], the Safe Drinking Water Act [42 U.S.C.A. § 300f et seq.], the Marine Protection, Research and Sanctuaries Act of 1972 [16 U.S.C.A. §§ 1431 et seq., 1447 et seq., 33 U.S.C.A. §§ 1401 et seq., 2801 et seq.],

or the Atomic Energy Act of 1954 [42 U.S.C.A. § 2011 et seq.] except to the extent that such application (or regulation) is not inconsistent with the requirements of such Acts.

42 U.S.C. § 6905(b)(1)

The Administrator shall integrate all provisions of this chapter for purposes of administration and enforcement and shall avoid duplication, to the maximum extent practicable, with the appropriate provisions of the Clean Air Act [42 U.S.C.A. § 7401 et seq.], the Federal Water Pollution Control Act [33 U.S.C.A. § 1251 et seq.], the Federal Insecticide, Fungicide, and Rodenticide Act [7 U.S.C.A. § 136 et seq.], the Safe Drinking Water Act [42 U.S.C.A. § 300f et seq.], the Marine Protection, Research and Sanctuaries Act of 1972 [16 U.S.C.A. §§ 1431 et seq., 1447 et seq., 33 U.S.C.A. §§ 1401 et seq., 2801 et seq.], and such other Acts of Congress as grant regulatory authority to the Administrator. Such integration shall be effected only to the extent that it can be done in a manner consistent with the goals and policies expressed in this chapter and in the other acts referred to in this subsection.

42 U.S.C. § 6945(a)

Upon promulgation of criteria under section 6907(a)(3) of this title, any solid waste management practice or disposal of solid waste

> or hazardous waste which constitutes the open dumping of solid waste or hazardous waste is prohibited, except in the case of any practice or disposal of solid waste under a timetable or schedule for compliance established under this section. The prohibition contained in the preceding sentence shall be enforceable under section 6972 of this title against persons engaged in the act of open dumping.

42 U.S.C. § 6972(a)(1)(A)

> Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf – against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter;

42 U.S.C. § 6972(a)(1)(B)

> Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf – [. . .] against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present

generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment;

– Federal Clean Water Act –

33 U.S.C. § 1342(a)(1)

National pollutant discharge elimination system. Permits for discharge of pollutants. Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

33 U.S.C. § 1311(a)

Illegality of pollutant discharges except in compliance with law. Except as in compliance with this section and sections 1312, 1316, 1317,

1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

– Federal Rules of Civil Procedure –

FRCP 26(a)(1)(B)

Initial Disclosures. Except in categories of proceedings specified in Rule 26(a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties: . . . a copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment;

FRCP 26(a)(2)(B)

Disclosure of Expert Testimony. Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support

for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

FRCP 26(e)

Supplementation of Disclosures and Responses. A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances: (1) A party is under a duty to supplement at appropriate intervals its disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed by the time the party's disclosures under Rule 26(a)(3) are due. (2) A party is under a duty seasonably to amend a prior response to an interrogatory, request

> for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

FRCP 37(c)(1)

> A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under Rule 37(b)(2)(A), (B), and (C) and may include informing the jury of the failure to make the disclosure.

STATEMENT OF THE CASE

Rockdale County, Georgia entered into contracts with the State of Georgia Department of Transportation ("GA DOT") and others to widen a stretch of state route 20 that passes near Ms. Jones' residence and her once pristine private lake. Rockdale County's responsibilities on the project included clearing the proposed new right-of-way of

underground storage tanks and other obstructions, developing and managing project design and implementation, certifying that "all needed rights of way" had been obtained, and obtaining "all needed permits" for the project. Construction on the stretch of road in the watershed that drains to Ms. Jones lake began sometime after February of 1996. During construction on that stretch of road, Rockdale County intentionally directed the polluted stormwater runoff from the road and the developing right-of-way into Ms. Jones' lake without her consent, without any Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* ("CWA") permits, and without a Resource Conservation Recovery Act, 42 U.S.C. §§ 6901 *et seq.* ("RCRA") disposal permit. Road construction ended on or about October of 2001. To this day, no permits have been obtained, much of the dumped material remains in Ms. Jones' lake, and the polluted stormwater runoff from the widened road continues to be intentionally and illegally dumped into Ms. Jones' lake with every storm. The polluted stormwater carries and deposits trash, chemicals, eroded soils, detritus – and during the construction – tons and tons of sand, silt and clay exposed by the construction land disturbance, into Ms. Jones' lake.

The increased volume and flows of polluted stormwater are an eyesore, flood and devalue Ms. Jones' property, kill her fish and other aquatic life, scour and erode her lake inlet and shore, and threaten her lake's earthen dam with overtopping and collapse. Ms. Jones brought suit seeking *inter alia*, an injunction against Rockdale County and others for violation of the permit requirements of the CWA and RCRA, and for violation of RCRA's open dumping and imminent and substantial endangerment prohibitions. The Eleventh Circuit Court of Appeals affirmed the District Court's conclusion that unless Rockdale County had authority to make so-called "ultimate" or "final decisions" about how

the stormwater runoff was directed, it could have no liability under RCRA or the CWA. The Eleventh Circuit affirmed the District Court's conclusion that the waste disposed of into Ms. Jones' lake is excluded from the definition of a 42 U.S.C. § 6903(27) RCRA solid waste because it is "subject to" a CWA under 33 U.S.C. § 1342 (i.e., a CWA § 402 permit). The 11th Circuit affirmed the District Court's conclusion that RCRA's application and integration provisions at 42 U.S.C. § 6905 prohibit Ms. Jones from simultaneously bringing her claims under RCRA and the CWA. Rockdale County claimed surprise when Ms. Jones argued at summary judgment that its CWA liability might, in part, be based on its ownership and control of the point source (i.e. the culvert pipe) that discharges the polluted stormwater. In response, the District Court excluded the ownership evidence pursuant to FRCP 37(c)(1), and the Eleventh Circuit affirmed.

REASONS FOR GRANTING THE PETITION

I. The Lower Courts' Opinions are Directly Contrary to the Plain Language of RCRA, the CWA, and Binding U.S. Supreme Court Precedent.

The Clean Water Act (CWA) regulates the discharge of pollutants into navigable waters of the United States. *U.S. Dept. of Energy v. Ohio*, 503 U.S. 607, 112 S. Ct. 1627 (1992). *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 124 S. Ct. 1537 (2004). The Resource Conservation and Recovery Act (RCRA) is a "sweeping statute intended to regulate solid waste from cradle to grave." *Carbone v. Town of Clarkston*, 511 U.S. 383, 114 S. Ct. 1677 (1994). Under RCRA, solid waste is defined to include liquids. 42 U.S.C. § 6903(27).

The CWA and RCRA prohibit the discharge of pollutants and disposal of solid waste, respectively, without the proper permits. *Id.*; *Ohio*; *Miccosukee*. In this case, it is undisputed that Ms. Jones' lake was used for pollutant discharges and waste disposals during construction and is still being used for pollutant discharges and waste disposals from the widened road. Rockdale County's position is that it has no liability for the disposals and discharges. Ms. Jones has consistently identified three independent factual bases for Rockdale County's CWA and RCRA liability.

First, in its contract with GA DOT, Rockdale County specifically accepted responsibility for obtaining *all* the permits needed for their road widening project. *See*, Appendix E. It is undisputed that no CWA or RCRA permits were applied for or obtained. Second, Rockdale County actually performed and was responsible for drainage design, and controlled portions of the land disturbance and other work that occurred in the watershed upgradient of Ms. Jones' lake. It is undisputed that Rockdale County's project design and implementation intended to put the discharges and disposals into Ms. Jones' lake. Third, Rockdale County owns and gave express approval for use of its Lennox Road right of way, including specifically its outfall culvert pipe, to convey the polluted stormwater runoff from the widened road into Ms. Jones' lake.[1]

The Court of Appeals and District Court opinions in this case hold that Rockdale County has no obligation to comply with the CWA or RCRA so long as GA DOT had final or ultimate authority to direct the stormwater into Ms. Jones lake. That is not the law.

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1. The District Court excluded evidence of Rockdale County's ownership of the point source (i.e. the culvert pipe). That issue is taken up *infra* at IV.

Under RCRA's "imminent and substantial endangerment" (ISE) citizen suit section at 42 U.S.C. § 6972(a)(1)(B), any person may bring suit against any person "who *has contributed or who is contributing* to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment (emphasis added). *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 116 S. Ct. 1251 (1996). This Court should grant the Writ of Certiorari because the lower Courts' opinions that only those persons having final or ultimate authority are liable for violating RCRA's ISE prohibition is plainly contrary to the express statutory language and purpose of RCRA. Ms. Jones is entitled to demonstrate that Rockdale County caused or contributed to an ISE, irrespective of whether Rockdale County had final or ultimate authority.

Under RCRA's "violations" citizen suit section at 42 U.S.C. § 6972(a)(1)(A) – which section also allows RCRA's 42 U.S.C. § 6945(a) open dumping prohibition to be enforced by citizen suit – any person may bring suit against "*any person . . . who is alleged to be in violation* of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to" RCRA. 42 U.S.C. § 6972(a)(1)(A). This Court should grant the Writ of Certiorari because the lower Courts' opinions that only those persons having final or ultimate authority are liable for violations of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to RCRA, is plainly contrary to the express statutory language and purpose of RCRA. Ms. Jones is entitled to demonstrate that Rockdale County violated RCRA – by for example, failing or refusing to satisfy the compliance obligation it assumed to obtain the

necessary permits – irrespective of whether Rockdale County had final or ultimate authority.

Under the CWA, "all dischargers of water pollution" may be sued to enforce permit conditions. . . ." *Environmental Protection Agency v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 96 S. Ct. 2022 (1976); *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 124 S. Ct. 1537 (2004) (persons whose conduct is a "cause-in-fact of the discharge of pollutants" in violation of the CWA have liability). Rockdale County's failure or refusal to obtain any permits, or otherwise obtain compliance with the CWA, makes Rockdale County a discharger on this project. This Court should grant the Writ of Certiorari because the lower Courts' opinions that only those persons having final or ultimate authority are CWA dischargers is plainly contrary to the binding CWA precedent of this Court.

II. The Conflicting Federal Court Decisions Interpreting RCRA's Solid Waste Exclusion Perpetuate Great Uncertainty About What the Law Is.

RCRA defines solid waste at 42 U.S.C. § 6903(27). Material that is discarded and not expressly excluded by 42 U.S.C. § 6903(27) is a RCRA solid waste. RCRA's solid waste definition expressly includes liquids but expressly excludes "*industrial discharges which are point sources subject to permits under section 1342 of title 33. . . .*" (emphasis supplied). 42 U.S.C. § 6903(27). In this case, the District Court and the Court of Appeals held that all the materials dumped into Ms. Jones' lake are excluded from RCRA's solid waste definition.

An analysis of the "subject to" possibilities helps clarify the issue. As an initial matter, the material being considered as RCRA solid waste must be both an *industrial discharge* and a *point source* for the 42 U.S.C. § 6903(27) exclusion to even arguably apply in the first place. During construction for the road widening in this case, the materials in Ms. Jones' lake that were stormwater and pollutants collected and sent through the Lennox Drive culvert, were an industrial discharge from a point source (significantly, that material is not all of the waste for which Rockdale County was responsible). However, when the "construction activity" on the Project ended, the industrial nature of the discharge ended. *See*, 40 C.F.R. § 122.26. As a result, all of the stormwater and other waste sent to Ms. Jones' lake since the end of construction, and all of the stormwater and waste sent to Ms. Jones' lake that did not discharge from the point source obviously are not excluded from RCRA's solid waste definition. Also, during construction, all the stormwater and other waste that was not discharged through the point source but, for example, eroded from or was otherwise carried off of the Church property and transported to the lake is also not excluded.

However, for those portions of the materials that constitute "industrial discharges which are point sources" the question remains whether those materials are "subject to" a CWA § 402 permit. The District Court and Court of Appeals held that the materials are excluded from RCRA regulation even though no CWA § 402 permit was sought or obtained and even though any other compliance with the CWA is disputed. This interpretation is error and is against the weight of case authority on the issue.

In *Water Keeper Alliance v. U.S. Department of Defense*, 152 F. Supp.2d 163, 169-70 (D. PR 2001), the court held that discharges occurring before the defendant obtained its CWA § 402 permit, or which – even after defendant obtained its permit – occurred to soil and groundwater rather than to navigable waters of the U.S., were not "subject to" that permit within the meaning of 42 U.S.C. § 6903(27). Likewise, in *United States v. Allegan Metal Finishing Co.*, 696 F. Supp. 275, 281 (W.D. Mich. 1988), the Court found:

> . . . no merit in defendant's argument that a NPDES permit – which did not authorize discharges into the Kalamazoo River until October 1987 – somehow precludes RCRA regulation with respect to the disposal of hazardous waste to its onsite ponds that occurred continuously from 1980 until October 1987.

Id. The majority of Courts addressing the 42 U.S.C. § 6903(27) "subject to" issue have reached a similar result. *See e.g., Lutz v. Chromatex, Inc.*, 725 F. Supp. 258 (M.D. Pa. 1989) (RCRA solid waste exclusion only for those actual discharges from point sources which are made pursuant to and authorized by a NPDES permit); *United States v. Allegan Metal Finishing Co.*, 696 F. Supp. 275 (W.D. Mich. 1988) (industrial wastewater discharged into holding ponds not excluded from RCRA waste definition); *Buchholz v. Dayton International Airport*, 1995 WL 811897, *23-24 (S.D. Ohio 1995) ("Dayton's discharges from the spillway are not authorized by Dayton's NPDES permit; thus, these discharges to the Mill Creek constitute disposal of 'solid waste' under RCRA" and subject defendants to RCRA liability if they *may* present an imminent and substantial endangerment to health or the environment); *cf. State v. PVS Chemicals, Inc.*,

50 F. Supp.2d 171, 178-9 (W.D. NY 1998) (discharges to groundwater are not excluded from solid waste definition, while point source discharges subject to CWA permit are excluded whether or not they are within effluent levels set in the permit); *Williams Pipeline Company v. Bayer Corporation*, 964 F. Supp. 1300, 1328-29 (S.D. Iowa 1997); *Fishel v. Westinghouse*, 617 F. Supp. 1531, 1538 (D.C. Pa. 1985).

In *United States v. Dean*, 969 F.2d 187, 194 (6th Cir. 1992), the Sixth Circuit held that waste was not excluded because the exclusion applied only to the point source discharge itself, "not the contents of the pond or discharges into it." *Id.* The Court in *Dean* based its reasoning on a comment to an EPA regulation defining the jurisdiction between RCRA and the CWA. The regulation clarified that RCRA's solid waste exclusion:

> . . . [a]pplies only to the actual point source discharge. It does not exclude industrial wastewaters while they are being collected, stored, or treated before discharge . . .

Id.; 40 C.F.R. § 261.4(a)(2). The Seventh Circuit reached the same result in a different case, noting that the RCRA exclusion is limited to certain discharges (i.e. covers only a subset of point sources regulated under the CWA), that not all disposals are discharges, and that "[t]he Clean Water Act is designed for the protection of navigable waters." *Inland Steel Co. v. U.S.E.P.A.*, 901 F.2d 1419, 1422-23 (7th Cir. 1990).

In this case, the waste about which Ms. Jones' complains arrived at her property as runoff from an adjacent church property and/or through the Lennox Drive point source

culvert for which Rockdale County never sought or obtained any CWA § 402 permit. Therefore, all the waste constitutes solid waste within the meaning of 42 U.S.C. § 6903(27). Alternatively, only those wastes that did not pass through the Lennox Drive culvert, are solid waste within the meaning of 42 U.S.C. § 6903(27). In either event, a significant amount of solid waste as defined by RCRA, was not "subject to" a CWA permit under § 402, and was disposed of at Ms. Jones' property in violation of RCRA and the CWA. In light of the conflicting federal court decisions, this Court should grant the Writ of Certiorari to clarify the circumstances where a discharge is "subject to" a CWA § 402 permit within the meaning of RCRA 42 U.S.C. § 6903(27).

III. The District Court and the Court of Appeals Have Failed or Refused to Interpret and Apply RCRA According to Its Plain Language.

The Court of Appeals and the District Court were required to give full effect to RCRA unless its provisions are in irreconcilable conflict with the CWA. *See, e.g., Morton v. Mancari*, 417 U.S. 535, 551, 94 S. Ct. 2474, 2483 (1974); *Radzanower v. Touche Rose & Co.*, 426 U.S. 148, 155, 96 S. Ct. 1989, 1993 (1976) (where two statutes are capable of co-existence, it is the duty of the courts to regard each as effective). Instead, the District Court and Court of Appeals hold that RCRA's application and integration provisions at 42 U.S.C. § 6905 bar Ms. Jones' simultaneous citizen suits under RCRA and the CWA. The District Court and Court of Appeals are clearly wrong. RCRA's application provision at 42 U.S.C. § 6905(a) requires in pertinent part:

> [n]othing in this chapter shall be construed to apply to (or to authorize any State, interstate, or

> local authority to regulate) any activity or substance which is **subject to** the Federal Water Pollution Control Act [33 U.S.C. 1251 et seq.] . . . except to the extent that such application (or regulation) is **not inconsistent** with the requirements of such Acts. (Emphasis supplied).

It is patently obvious from the statutory text that Congress intended for RCRA to apply to some activities or substances "subject to" the CWA. Otherwise, 42 U.S.C. § 6905(a) could have simply excluded application of RCRA altogether from any activity or substance "subject to" the CWA. Instead, 42 U.S.C. § 6905(a) excepts RCRA application only "to the extent that such application (or regulation) is not inconsistent with the requirements" of the CWA. The Court of Appeals and District Court both ignored the plain language of the statute and failed to give full effect to RCRA, as neither demonstrates how RCRA and the CWA are inconsistent in this case. They simply held summarily that Ms. Jones' RCRA claims are barred by 6905(a). This Court should grant the Writ of Certiorari to clarify and require the lower courts to interpret and apply the statute as it is written.

RCRA's integration provision at 42 U.S.C. § 6905(b)(1) requires in pertinent part:

> [t]he **Administrator shall** integrate all provisions of this chapter for purposes of administration and enforcement and shall avoid duplication, to the maximum extent practicable, with the appropriate provisions of the ... the Federal Water Pollution Control Act [33 U.S.C. 1251 et seq.], . . . and such other Acts of Congress as grant regulatory authority to the Administrator. Such **integration**

> **shall be** effected only to the extent that it can be done in a manner **consistent** with the goals and policies expressed in this chapter and in the other acts referred to in this subsection. (Emphasis supplied).

This "anti-duplication" section on its face operates only on the U.S. EPA Administrator. It cautions the Administrator against promulgating RCRA regulations that are "inconsistent with the requirements" of the CWA. Thus, 42 U.S.C. § 6905(b) is nothing more than a general admonition to the U.S. EPA Administrator against wasteful regulation. *United States v. Vineland Chemical Company, Inc.*, 692 F. Supp. 415, 420-21 (D.N.J. 1988) (Section 6905(b) creates no rights in defendants to resist regulation; rather, it constitutes an exhortation to the U.S. EPA to avoid unnecessary and overlapping regulation). Because RCRA's Section 6905(b) anti-duplication provision is a mere admonishment to the U.S. EPA to avoid unnecessary and overlapping regulation, it is not a right enforceable by the regulated community that wish to avoid application of RCRA to their waste disposal activities. *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., Inc.*, 989 F.2d 1305, 1317 (2d Cir. 1993).

The Court of Appeals and the District Court ignored the plain language of RCRA and failed to give full effect to the statute. Neither court states how RCRA's congressional admonishments to the U.S. EPA in 6905(b)(1), preclude Ms. Jones from bringing her claims simultaneously under RCRA and the CWA. This Court should therefore grant the Writ of Certiorari to reverse the lower courts' erroneous determination that statutory directives to the United States EPA Administrator regarding regulation promulgation, somehow preclude consistent simultaneous citizen suits under RCRA and the CWA.

IV. A Defendant's Claimed "Surprise" Which Would Support Exclusion of Plaintiff's Evidence Under FRCP 37(c)(1) Must Be Genuine, Not a Fabrication, and Not the Result of Defendant's Willful Ignorance.

In her summary judgment briefing, Ms. Jones argued that Rockdale County's CWA liability is in part based upon its ownership of an outfall pipe culvert at Lennox Road (i.e., the point source). In response, Rockdale County succeeded in having the evidence of its ownership of the culvert excluded under FRCP 37(c)(1) by claiming that it understood Ms. Jones' case against it was based solely on its role in obtaining a project design that used Ms. Jones' lake (so-called "design flaw") to dispose of the stormwater. If, as it claimed, Rockdale County understood the case against it to consist solely of what it calls a design flaw, then it simply fabricated that allegation and/or had its proverbial head in the sand. From the outset, Ms. Jones had always claimed in writing that Rockdale County had CWA liability as an "owner and/or operator." The only point source that has ever been discussed in detail in this case is Rockdale County's outfall pipe culvert at Lennox Road that discharges onto the Church property.

Rockdale County disclosed its ownership of the Lenox Drive right-of-way (that includes the culvert) to Ms. Jones in its pre-litigation correspondence with Ms. Jones. In her written discovery responses to the County, Ms. Jones specifically informed the County she intended to rely on *all* of their correspondence to prove Rockdale County's CWA liability. In the CWA portion of her brief in support of partial summary judgment, Ms. Jones argued ". . . the storm drains, culverts, storm sewers and other pipes handling stormwater from the Project here are point sources under the CWA."

The fact that Rockdale County owned the only point source discharging onto the church property that had *ever* been at issue in the case, could not have come as a surprise to Rockdale County. The fact that Ms. Jones was alleging "owner and/or operator" liability against Rockdale County, for whatever it owned or operated that caused or contributed to the violations, could not possibly have surprised Rockdale.

Ms. Jones had specifically stated in her Complaint that Rockdale is an "Owner and/or Operator." Ms. Jones' had previously served expert reports to Rockdale County that included the alleged new information, as required by FRCP 26(a)(2)(B). The report of Ms. Jones' expert biologist (Mark Larue) for example discusses the Lennox Road right of way and outfall culvert specifically and at length. Mr. Larue's report contains photographs of the Lenox Drive outfall culvert and contains the results of numerous analytical samples taken at the Lenox Drive outfall culvert (identified interchangeably as "Discharge of Culvert" and as "storm outlet"). Rockdale deposed Mr. Larue at length specifically about the Lennox Drive stormwater collection and discharge structures. At one point during their deposition questioning, Rockdale just told Mr. Larue:

p48

1 Q. When I ask you these questions, I am talking

2 about Lenox Road. I am assuming you didn't do any

3 research outside of that along Lenox Road, did you?

> 4 A. My scope was limited to that stretch of
> 20 that
>
> 5 drains along Lenox Road.

Thus, any failure by Ms. Jones to again supplement or amend with the fact that she was basing her claim on Rockdale's ownership of the Lenox Drive culvert outfall was harmless within the meaning of FRCP 37(c)(1), because that is the only point source discharging onto the church property that the parties had been fighting over for almost five years before the lawsuit was filed. In fact, virtually every piece of written correspondence between Rockdale County and Ms. Jones discussed the discharge from that culvert. Ms. Jones was not required to supplement or amend her prior responses. *See*, FRCP 26(e); FRCP 26(a)(2)(B).

There was never – as a matter of law and common sense – any justification for Rockdale County to "understand" that the owner/operator allegations in Ms. Jones' complaint were not being made against it. There was no justification for Rockdale County to disregard Ms. Jones' owner/operator allegations as "boilerplate" (as it refers to them) – e.g. not to be taken seriously. Ms. Jones' Complaint *specifically* plead that "Defendant County ... is an owner and/or operator" ... "of the source. ..." There was no justification for Rockdale County to not take seriously Ms. Jones' interrogatory response that she was relying on all of Rockdale County's correspondence with her to prove her case against Rockdale County. As a result, any failure to supplement discovery by Ms. Jones in this case was upon "substantial justification" within the meaning of Rule 37(c)(1) because Ms. Jones reasonably and correctly believed her discovery responses were complete, and she actually knew that the information

Rockdale County claims is a surprise had already been made known to Rockdale County in discovery, in other writings, and during depositions. Thus, the District Court abused its discretion by excluding the evidence. FRCP 37(c)(1) permits the Court to impose "appropriate sanctions" other than evidence exclusion. Ms. Jones was not required to supplement or amend her prior responses. *See* FRCP 26(e); FRCP 26(a)(2)(B).

The Federal Rules of Civil Procedure are concerned with prevention of surprise to be sure, but the surprise must be genuine and justified. Where as here, the complaining party cannot legitimately claim surprise because FRCP 26(e) was satisfied by its correspondence in writing for years with the Plaintiff regarding the facts and claims alleged to be a surprise, and had served and received discovery thereon, and was on notice of Plaintiff's facts and claims via the Complaint, and the Initial Disclosures pursuant to FRCP 26(a)(1)(B), and the expert disclosures pursuant to FRCP 26(a)(2)(B), it must certainly be an abuse of discretion for the harsh sanction imposed by the district court to be allowed to stand in the face of such an obviously fabricated allegation of surprise. This Court should grant the Writ of Certiorari to establish that the "surprise" which will support exclusion of evidence under FRCP 37(c)(1) must be genuine, not a fabrication, and not the result of willful ignorance.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED SEPTEMBER 8, 2004

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 04-12206
Non-Argument Calendar

D.C. Docket No. 01-02038-CV-TWT-1

FRAN JONES,

Plaintiff Appellant,

versus

ROCKDALE COUNTY, GEORGIA,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(SEPTEMBER 8, 2004)

Before BIRCH, DUBINA and PRYOR, Circuit Judges.

PER CURIAM:

Fran Jones appeals a grant of summary judgment in favor of Rockdale County. Jones sued Rockdale County (County) along with several other defendants and alleged that they

damaged a lake on her property during a construction project to widen State Route 20 (SR20). All of the other defendants were voluntarily dismissed; only the County remains. Jones contends that the project polluted her lake, but the record shows the County neither owns nor controlled the project. Jones argues that the district court erred when it (1) held that the County did not violate the Clean Water Act (CWA), 33 U.S.C. section 1251 *et seq.*; (2) held that the County did not violate the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. section 6901 *et seq.*; (3) excluded, as a sanction for discovery misconduct, evidence relating to the ownership of the Lennox Drive culvert that Jones belatedly maintains is a point source for polluted water and solid waste; and (4) held that Jones's state law claims were barred by the ante-litem notice requirement under Georgia law, O.C.G.A. section 36-11-1. For the reasons stated below, we affirm.

I. STANDARD OF REVIEW

We review *de novo* the grant or denial of summary judgment and view the record and all factual inferences in the light most favorable to the nonmoving party. *Holbrook v. City of Alpharetta*, 112 F.3d 1522, 1525-26 (11th Cir. 1997). The decision of a district court to exclude evidence is reviewed for abuse of discretion. *Chapman v. AI Transp.*, 229 F.3d 1012, 1023 (11th Cir. 2000).

II. DISCUSSION

We address first the exclusion of the Lennox Drive culvert evidence, because that ruling affects the analysis of Jones's CWA and RCRA claims. We then address the merits of Jones's complaint under the CWA, RCRA, and state law.

Appendix A

A. Lennox Drive Evidence

Jones argues that the district court erred by excluding evidence relating to the ownership by the County of the Lennox Drive culvert. The district court excluded that evidence because Jones refused to answer fully interrogatories propounded by the County and Jones did not assert ownership of the Lennox Drive culvert as a theory of liability until after discovery had ended. Jones contends that even if she was wrong in not fully answering the interrogatories, the error was harmless.

We disagree. To prevent the exclusion of this evidence, Jones bore the burden of convincing the district court that her non-responsive answers to the interrogatories were harmless. Fed. R. Civ. P. 37(c)(1). Jones objected to the interrogatories and stated that the information sought could be obtained from her complaint and from her deposition testimony, but as the district court found, Jones maintained throughout discovery that the County was liable for the faulty design of the SR20 project, not because it owned the Lennox Drive culvert. Jones belatedly asserted her Lennox Drive theory of liability after the County based its defense on lack of ownership and control of SR20. To allow Jones to change her theory of recovery after the County moved for summary judgment would have prejudiced the County, and it is that type of injustice that the discovery rules are intended to prevent. *Cf. Shelak v. White Motor Co.*, 581 F.2d 1155, 1159 (5th Cir. 1978) ("Plaintiff's disregard for the federal rules of discovery in this area created a `trial by ambush' which those rules are designed to prevent."). We conclude, therefore, that the district court did not abuse its discretion by excluding the Lennox Road ownership evidence.

Appendix A

B. CWA Liability

Jones argues that the district court erred by holding that the County was not liable under the CWA. She contends that the involvement of the County in the SR20 project makes it liable under the citizen suit provision of the CWA, 33 U.S.C. section 1365. The County, in Jones's view, is a discharger of polluted water into her lake.

The CWA allows citizens, acting as private attorneys general, to sue entities that discharge pollutants into the navigable waters of the United States without obtaining a permit in advance. An alleged violation must be ongoing for relief to be available under section 1365(a). Section 1365(a) states, "[A]ny citizen may commence a civil action on his own behalf . . . against any person . . . who is alleged to be in violation of an effluent standard or limitation under this chapter. . . ." 33 U.S.C. § 1365(a) (emphasis added). The Supreme Court has held that this provision does not permit citizen suits for wholly past violations. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 64, 108 S. Ct. 376, 385 (1987). Section 1365(a) does not serve as a tort remedy for private actors; its purpose is abating pollution. *See id.* at 61, 108 S. Ct. at 383.

The record is undisputed that the County does not own or maintain SR20, and the County was not the final authority on matters relating to the SR20 widening project. Although the County played a role in obtaining the allegedly faulty design, the County was required to submit the plans to the Georgia Department of Transportation (GDOT) for final approval. The County recognized that there were potential

problems with the design that could affect Jones's lake, and the County recommended design changes to address those concerns. GDOT rejected those recommendations. The County, therefore, was not responsible for the design flaw at issue, and it cannot be liable as a discharger of pollution. *Cf. City of Las Vegas v. Clark County*, 755 F.2d 697, 703 (9th Cir. 1985) ("defendants are not dischargers and cannot be in violation of [section 1365(a)]"). Summary judgment was appropriate.

C. RCRA Liability

Jones argues that the district court erred by holding that the County was not liable under the RCRA. Under 42 U.S.C. section 6945(a), a person may not, without a permit, dispose solid waste in any place other than a landfill. Jones sued the County, under 42 U.S.C. section 6972(a), which allows citizens to bring suit against violators of the RCRA. She contends that the County is liable for the solid waste (silt and trash) that is carried from a neighboring property by stormwater runoff from SR20 and deposited into her lake. For the County to be liable, Jones must show that the County is the entity responsible for discharging the water that flows across the neighboring property and into her lake. *See* 42 U.S.C. § 6945(a) (RCRA enforceable only against "persons engaged in the act of open dumping").

As was true of her claim under the CWA, Jones erroneously contends that because the County was involved in the planning of the SR20 project, it is liable for the waste generated by the stormwater runoff. In support, Jones cites *Cox v. City of Dallas*, 256 F.3d 281, 296 (5th Cir. 2001), in

which the Fifth Circuit held that the City of Dallas was liable for RCRA violations committed by city contractors. *Cox* does not help Jones, because in *Cox* Dallas had control over the contractors who illegally disposed of the solid waste, and Dallas exercised that control negligently. *Id.* at 296-97.

The County did not have control over the SR20 project; the record is undisputed that ultimate authority was vested in the GDOT. The County, unlike Dallas, had no authority to make final decisions relating to how stormwater runoff was directed. We need not address the conclusions of the district court that Jones's claim of "open dumping" is barred by the anti-duplication provision of section 1006, 42 U.S.C. section 6905, and the discharges into Jones's lake are not "solid waste" as defined by the RCRA, even though both appear-to be correct. The record shows that the County did not engage "in the act of open dumping," and the County, therefore, cannot be liable under the RCRA. *See* 42 U.S.C. § 6945(a).

D. State Law Claims

Jones argues that the district court erred by granting summary judgment against her claims brought under state law. Jones contends that she satisfied the ante-litem notice requirement under Georgia law, which requires all claims against counties to be presented within twelve months after they accrue. O.C.G.A. 36-11-1. In the alternative, Jones argues that the ante-litem notice does not apply to this case because the County is engaged in a continuing trespass of her property.

Appendix A

Jones did not satisfy the ante-litem requirement of O.C.G.A. 36-11-1. Under Georgia law, a cause of action for a taking of property accrues "as of the point in time when the damaging activity has reached a level which substantially interferes with the owner's use and enjoyment of his property." *Hulsey v. Dep't of Transp.*, 498 S.E.2d 122, 126 (Ga. Ct. App. 1998). Jones testified in her deposition that there was a substantial impact on her property from the SR20 project as early as July of 1999. She was required to notify the County of her claim within twelve months of that date. It is undisputed that Jones sent her ante-litem notice on February 28, 2001, well beyond the twelve month limit.

Jones contends that she substantially complied with the ante-litem provision because her correspondence with the County starting in 1996 put the County on notice of her potential claim. We disagree. None of the letters Jones cites contains the level of detail required to comply substantially with the ante-litem statute. *See Burton v. DeKalb County*, 415 S.E.2d 647, 678 (Ga. Ct. App. 1992). The letters amount to nothing more than a general expression of concern over the potential impact of the SR20 project. The record contains no letters sent by Jones to the County after July 1999, the date when Jones first experienced a substantial impact on her property. Notice of claims "must be presented within 12 months after they accrue. . . ." O.C.G.A. 36-11-1 (emphasis added).

In her reply brief, Jones admits that she has always maintained that her citizen suit notice, attached as exhibit A to her complaint, also served as her ante-litem notice. Jones's claim accrued in July 1999; she did not give notice of her

claim until February 28, 2001. Jones failed to comply substantially with the ante-litem statute.

Jones argues, in the alternative, that the ante-litem notice provision does not apply, because the County is engaged in a continuing trespass to her property. Jones erroneously relies on *Gordy Construction Company v. KHM Development Company, Inc.*, 197 S.E.2d 426, 429 (Ga. Ct. App. 1973), in which the Georgia Court of Appeals held that the ante-litem notice requirement did not apply because a defendant committed a continuing trespass. Unlike the defendant in *Gordy*, the County is not engaged in a continuing trespass, because it does not have control over the discharges from SR20.

III. CONCLUSION

We conclude that (1) the district court did not abuse its discretion by excluding the Lennox Road culvert evidence and (2) summary judgment was proper as to Jones's CWA and RCRA claims. We further conclude that Jones's state law claims are barred because she did not give the required twelve month notice to the County.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION FILED JANUARY 30, 2004

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

CIVIL ACTION FILE
NO. 1:01-CV-203 8-TWT

FRAN JONES,

Plaintiff,

v.

E.R. SNELL CONTRACTOR, INC., et al.,

Defendants.

ORDER

This is an action seeking damages and injunctive relief for violations of the Clean Water Act, 33 U.S.C. § 1365, the Resource Conservation and Recovery Act, 42 U.S.C. § 6945, and various state law claims. The case is before this Court on cross motions for summary judgment. For the reasons set forth below, the Plaintiff's Motion for Partial Summary Judgment [Doc. 74] is denied. The Defendant Rockdale County's Motion for Summary Judgment [Doc. 73] is granted.

Appendix B

I. BACKGROUND

Plaintiff Fran Jones is a resident of Rockdale County, Georgia. She owns a tract of land situated at 822 Lennox Drive in Rockdale County, consisting of 49.2 acres, including a 3.75 acre lake. The only remaining Defendant in this action, Rockdale County, is a political subdivision of the state of Georgia. The Plaintiff claims that Rockdale County violated the Clean Water Act, the Resource Conservation and Recovery Act, and committed various state law torts because the County is responsible for the deposit of pollutants on her property and in her private lake.

On September 27, 1994, Rockdale County and the Georgia Department of Transportation entered into an agreement to widen from two lanes to four lanes a section of State Route 20 located in Rockdale County, Georgia. (Def.'s Ex. A.) The contract spells out the duties of the parties to the agreement. Rockdale County agreed that it would be responsible for the following: (1) funding the design engineering on the project; (2) obtaining the final right of way and construction plans; (3) acquisition of the necessary rights of way for the project using the Department's funds; and (4) all necessary utility adjustments and relocation costs. (Id.) All plans were subject to the Department's guidelines and required final approval by the Department. (*Id.*) Once the plans for the project were approved and completed, the Department of Transportation was to "let the project for construction," and except as otherwise provided, was to "bear all costs associated with the actual construction" of the project and was "solely responsible" for securing and awarding the construction contract. (*Id.*) Rockdale County

did not participate in the physical construction of the project. (Kaiser Aff. ¶ 7.) "Rockdale County was not responsible for the maintenance of any of the stormwater pipes, paved area or right of way of State Route 20 during the Project or following completion of the Project nor does Rockdale County have any ownership in any of said improvements or right of way." (Kaiser Aff. 8.) The final plans for the project were approved by the Georgia Department of Transportation. (Kaiser Aff. ¶ 12.)

The Plaintiffs property lies near the intersection of State Route 20 and Lennox Road. (Jones Aff. ¶ 2.) The lake on her property receives runoff from her property, an adjacent residential subdivision developed by the Plaintiffs husband, and from the Epiphany Lutheran Church. (Jones Aff. ¶ 4.) The church and State Route 20 are uphill from her property. (Jones Aff. ¶ 6.) The Plaintiff claims that during the widening of State Route 20, she observed sediment discharges into her private lake, erosion and structural damage to her culverts and the lake's shore, fish kills in the lake, water color changes in the lake, and the presence of household type trash and other pollutants in her lake and on her land. (Jones Aff. ¶¶ 8-9.) She claims that the damage to her lake and property is the result of the increased stormwater runoff produced by the improvements to State Route 20. The Plaintiff never granted an easement authorizing the additional stormwater discharge caused by the State Route 20 improvement project. (Jones Aff. ¶¶ 14-15.) The Plaintiff gave her ante-litem notice to the Defendant on February 28, 2001, and then filed this suit in August of 2001. The parties currently await this Court's ruling on cross motions for summary judgment.

Appendix B

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate only when the pleadings, depositions, and affidavits submitted by the parties show that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). An issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue is material if it "might affect the outcome of the suit under the governing law." *Id.* The court should view the evidence and any inferences that may be drawn in the light most favorable to the nonmovant. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). The party seeking summary judgment must first identify grounds that show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). The burden then shifts to the nonmovant, who must go beyond the pleading's and present affirmative evidence to show that a genuine issue of material fact does exist. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986).

III. DISCUSSION

The Plaintiff claims that the Defendant violated the Clean Water Act, the Resource Conservation and Recovery Act, and committed various state law torts by causing increased stormwater runoff to flow onto her property and into her lake. The Defendant disputes each of the Plaintiff's claims.

Appendix B

A. Clean Water Act

The Plaintiff contends that the Defendant violated the Clean Water Act; and she brings this action pursuant to the citizen suit provision of 33 U.S.C. § 1365. The Clean Water Act makes it illegal to introduce pollutants from any point source into the navigable waters of the United States without a permit. 33 U.S.C. §§ 1311(a), 1342. The Plaintiff contends that the Defendant violated the Act by causing stormwater runoff to flow onto her land and into her lake. The Defendant first denies that it discharged any pollutants, and then argues that even if it did, it did not violate the Clean Water Act because the proper permit was not available.

The parties do not dispute that the Plaintiff's lake constitutes waters of the United States within the meaning of the Clean Water Act. The parties do not dispute the fact that stormwater runoff is a pollutant within the meaning of the Clean Water Act. What is disputed, however, is whether the Defendant discharged any stormwater runoff into the Plaintiff's lake. There are two ways in which the Defendant could be a discharger of pollutants into the Plaintiff's lake. First, the Defendant is a discharger if it performed work which created a point source from which pollutants were discharged into the Plaintiff's lake. A point source is "any discernible, confined and discrete conveyance, ... from which pollutants are or maybe discharged." 33 U.S.C. § 1362(14). Second, the Defendant is a discharger if it had responsibility for, or control over, the performance of work which created a point source for the discharge of pollutants into the Plaintiff's lake. *United States v. Lambert*, 915 F. Supp. 797, 802 (S.D. W.Va. 1996); *United States v. Sargent*

County Water Resource Dist, 876 F. Supp. 1081, 1088 (D.N.D. 1992); *United States v. Board of Trustees of Florida Keys Community College*, 531 F. Supp. 267, 274 (S.D. Fla. 1981).

In its Motion for Summary Judgment, Rockdale County argues that the Plaintiff has no Clean Water Act claim against it because it did not "discharge" anything as a result of the widening of State Route 20. The County argues that the Georgia Department of Transportation had responsibility for and control of the highway widening project and, therefore, was the party responsible for any discharges of pollution into the Plaintiff's lake. It is undisputed that State Route 20 is a state highway, owned and maintained by the state of Georgia. A citizen suit under the Clean Water Act is not permitted for purely past violations of the Act. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation Inc.*, 484 U.S. 49, 64 (1987). The Act requires active conduct in order to impose liability in a citizen suit. *Froebel v. Meyer*, 217 F.3d 928, 938-39 (7th Cir. 2000); *City of Las Vegas, Nevada v. Clark County, Nevada*, 755 F.2d 697, 703 (9th Cir. 1985) ("Section 505(a)(1) provides a cause of action only against one discharging excess pollutants into a waterway.") Rockdale County makes a persuasive argument that it is not a "discharger" for stormwater runoff from a highway owned and maintained by the state of Georgia.

Throughout the course of this litigation, the Plaintiff has taken the position that Rockdale County's liability derived from its involvement in the widening of State Route 20. Nevertheless, in her response to the Defendant's Motion for Summary Judgment, the Plaintiff asserts the entirely new

argument (notably absent from her own Motion for Partial Summary Judgment and her first affidavit) that the point source from which pollutants are discharged onto her land and into her lake is the system of "stormwater curbs, gutters, drains, pipes and culverts along the north side of Lennox Road." (Pl.'s Br. in Opp. at 9.) The stormwater drainage system on the north side of Lennox Road (not State Route 20) is owned and maintained by the Defendant. (Def.'s Opp. Ex. 3 at 800889-90.) The Plaintiff contends that the improvements made to that road drainage system to handle the excess runoff from the State Route 20 improvement project make it a point source of pollution discharge within the purview of the Clean Water Act.

Rockdale County contends that the Court should not consider the Plaintiff's new claim because she failed to disclose it during discovery. The Court agrees. The time for discovery had ended and summary judgment motions were pending when the Plaintiff came up with her new theory of liability. In her deposition, the Plaintiff testified that her complaint against Rockdale County was that it failed to take steps to protect her lake in the design and engineering of the highway widening project. (Jones Dep. at 145). The Defendant's Interrogatory No. 2 asked the Plaintiff to state the facts upon which she relied for each claim for relief. The Plaintiff objected to answering the interrogatory on the grounds that the information sought could be obtained from her deposition. This response was incomplete if the Plaintiff was relying upon the County's ownership and maintenance of the "stormwater curbs, gutters, drains, pipes and culverts along the north side of Lennox Road." If she intended to make that claim, the Plaintiff was required by Rule 26(e) to

supplement her response, but she did not. The failure is not harmless; allowing the new claim would completely change the nature of the case. Accordingly, Rule 37(c)(1) requires the exclusion of the evidence that the Plaintiff now relies upon in opposing the Defendant's Motion for Summary Judgment.

Based upon the evidence properly before the Court, there is no genuine issue of material fact as to whether Rockdale County is a "discharger" of pollution into the waters of the United States. It is not because it does not own, maintain or control State Route 20. It was not required to obtain a discharge permit issued by the Environmental Protection Agency or an approved state agency. The Plaintiffs legitimate complaint about the effect on her property of the widening of State Route 20 is with the Georgia Department of Transportation which was a Defendant in this action. Rockdale County cannot be enjoined from violations of the law caused by the ownership, operation and maintenance of a state highway. Rockdale County is entitled to summary judgment on the Plaintiffs Clean Water Act claims.

B. Resource Conservation and Recovery Act

The Resource Conservation and Recovery Act ("Recovery Act") prohibits the open dumping of solid or hazardous waste. 42 U.S.C. § 6945(a). Rockdale County contends that it is entitled to summary judgment on the Plaintiff s Recovery Act claims for two reasons. First, Rockdale County asserts that the type of pollution discharge in this case is exempted from the Recovery Act by the anti-duplication provisions enacted by the EPA. Second,

Rockdale County contends that the discharges in this case are not solid waste as defined by the Recovery Act at 42 U.S.C. § 6903(27). Because Rockdale County is correct on both points, it is entitled to summary judgment on the Plaintiff s Recovery Act claims.

Initially, the pollution discharges at issue in this case are exempted from the coverage of the Recovery Act because they are instead regulated by the Clean Water Act. The Recovery Act itself does not spell out what amounts to an "open dumping" violation, but instead, leaves this to be determined by the Environmental Protection Agency. 42 U.S.C. § § 6907, 6945. In section 6905, Congress provided the EPA with guidelines for applying and integrating the Recovery Act with other legislation, including the Clean Water Act. In pertinent part, Congress said that the Recovery Act regulations could not be inconsistent with the Clean Water Act, and should, to the maximum extent possible, avoid duplication with its provisions. 42.U.S.C. § 6905. The EPA's Administrator took heed to those congressional directives, and in adopting the final version of the Recovery Act's criteria, noted that the regulations were designed to eliminate double liability under the Clean Water Act and the Recovery Act. 46 Fed. Reg. 47050 (1981). In doing so, the Administrator reaffirmed the belief that the enforcement mechanisms of the Clean Water Act were sufficient to handle its own violations. *Id.*

Since the EPA was given authority to determine what constitutes open dumping under the Recovery Act, its construction and regulations are entitled to controlling weight unless "arbitrary, capricious, or contrary to the statute."

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44 (1984). Given the fact that the letter of the statute expressed a desire to avoid duplication, the EPA's construction and regulations which avoid duplication are not "arbitrary, capricious, or contrary to the statute." Accordingly, since the pollution issues in this case are covered by the Clean Water Act, Rockdale County is entitled to summary judgment on the Plaintiff's Recovery Act claims. *See Long Island Soundkeeper Fund Inc. v New York Athletic Club*, 1996 WL 131863 (S.D.N.Y. 1996).

Additionally, Rockdale County is entitled to summary judgment because the pollution discharge in this case does not meet the statutory definition of "solid waste." Solid waste, as defined by the Recovery Act, does not include "solid or dissolved materials in . . . industrial discharges which are point sources subject to permits under section 1342 of Title 33." 42 U.S.C. § 6903(27). An industrial activity which would give rise to an industrial discharge includes "construction activity including clearing, grading and excavation, except operations, that result in the disturbance of less than five acres of total land area." 40 C.F.R. § 122.26(b)(14)(x). The State Route 20 improvement project involved construction activities and more than five acres of land. Thus, its stormwater discharges are excluded from the definition of "solid waste:" 40 C.F.R. § 261.4(a)(2) (comment). This exception, of course, was not designed to eliminate all liability for such discharges. Rather, the exception for industrial discharges "subject to permits under section 1342 of Title 33" is a further attempt to avoid duplication with the provisions of the Clean Water Act. *See Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp.

1300, 1328 (S.D. Iowa 1997). Accordingly, because the discharges in this case do not amount to dumping of a "solid waste" as defined by the Recovery Act, Rockdale County is entitled to summary judgment on those claims.

C. State Law Claims

The Plaintiff brought several state law claims against Rockdale County, including nuisance, trespass, negligence and violation of riparian rights. Jurisdiction of those claims is supplemental, based on 28 U.S.C. § 1367. Rockdale County has sovereign immunity as to all claims which do not amount to an inverse condemnation of the Plaintiff s land. *DeKalb County v. Orwig*, 261 Ga. 137, 138 (1991). As to her inverse condemnation claim, Rockdale County contends that the Plaintiffs failure to provide the proper ante-litem notice bars that claim. In Georgia, "[all] claims against counties must be presented within 12 months after they accrue or become payable or the same are barred .. ." O.C.G.A. § 36-11-1. In *Hulsey v. Department of Transp.*, 230 Ga. App. 763 (1998), the Georgia Court of Appeals discussed the accrual of inverse condemnation claims, and held that a taking occurs "as of the point in time when the damaging activity has reached a level which substantially interferes with the owner's use and enjoyment of his property." *Id.* at 766 (internal citations omitted). Generally then, ante-litem notice must be given within twelve months of the point in time when the damaging activity substantially interferes with the owner's use and enjoyment of the property. However, Georgia precedent relaxes the ante-litem notice requirement whenever there is additional damage caused by a continuing nuisance. *Reid v. Gwinnett County*, 242 Ga. 88, 89-90 (1978). Nevertheless,

the damages which may be recovered in such a case are limited to damages suffered during the twelve months preceding the ante-litem notice. *Id.* The continuous nuisance dispensation does not apply here because the County is not responsible for a nuisance caused by the ownership and maintenance of a state highway. The Plaintiffs only legitimate complaint against the County is that the design of the highway widening project was faulty. Therefore, the County was entitled to ante-litem notice within twelve months after the project substantially interfered with her property. The Plaintiff has admitted in deposition that the project substantially interfered with her property as early as July 1999. (Jones Dep. at 140).

It is undisputed that the Plaintiff delivered an ante-litem notice to Rockdale County on February 28, 2001. That is more than twelve months after her action accrued. The Plaintiff, however, contends that she gave the County ante-litem notice of her claims on February 29, 1996. While the Plaintiff did address concerns she had with the handling of the State Route 20 improvement project on multiple occasions, none of her written communications with Rockdale County or its agents substantially satisfied the ante-litem notice requirement. *See Burton v. DeKalb County*, 202 Ga. App. 676, 678 (1992) (substantial compliance with ante-litem notice requirement is sufficient); *Williams v. Lowndes County*, 120 Ga. App. 429 (1969) (ante-litem notice must be in writing). The purpose of the ante-litem notice requirement is to give the County notice of the Plaintiffs grievance, and an opportunity to investigate and settle the claim before suit. *Burton v. DeKalb County*, 202 Ga. App. at 677. Therefore, at a minimum, proper ante-litem notice must

notify the County that the Plaintiff has a claim upon which it may bring suit - generalized complaints about how the County conducts its business are insufficient.

The Plaintiff cited thirteen different times she claims to have provided Rockdale County with written notice of her claims prior to the actual filing of this lawsuit. (Pl.'s Resp. to Def's Statement of Facts at 14-15.) Of those thirteen different times, only six represented communications from the Plaintiff regarding her concerns with respect to the handling of the State Route 20 improvement project. (Jones Aff., Tab 3 at 800886, 800903, 800923, 800924-25, 800927, and 800942.) Out of those six communications from the Plaintiff, none put Rockdale County on notice that the Plaintiff had a claim upon which she might base a lawsuit. Rather, the Plaintiffs communications were expressions of concern about the State Route 20 improvement project, and expressions of the Plaintiff's concern for her lake. None of the Plaintiffs communications referenced a claim she had against the County; indeed, some of her purported ante-litem notice communications were made before any damage was done to her lake or property upon which the Plaintiff could base a claim. (Jones Dep. at 139-40) (stating that there was a substantial impact on her lake from sediment and erosion in July of 1999). Therefore, Rockdale County is entitled to summary judgment on the Plaintiffs state law claims.

Appendix B

IV. CONCLUSION

For the reasons set forth above, the Defendant's Motion for Summary Judgment [Doc. 73] is GRANTED. The Plaintiffs Motion for Partial Summary Judgment [Doc. 74] is DENIED. The Clerk-is directed to enter judgment in favor of the Defendant Rockdale County.

SO ORDERED, this So day of January, 2004.

s/ Thomas W. Thrash
THOMAS W. THRASH, JR.
United States District Judge

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION DATED AND FILED FEBRUARY 3, 2004

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION FILE

NO. 1:01-cv-2038-TWT

FRAN JONES,

Plaintiff,

vs.

E.R. SNELL CONTRACTOR, INC., et al.

Defendants.

JUDGMENT

This action having come before the court, Honorable Thomas W. Thrash, Jr., United States District Judge, for consideration of Defendant Rockdale County's Motion for Summary Judgment, and the court having granted said motion and having directed that judgment be entered pursuant to Rule 84(b), Federal Rules of Civil Procedure, it is

Ordered and Adjudged that the judgment is entered in favor of Defendant Rockdale County.

Appendix C

Dated at Atlanta, Georgia this 3rd day of February, 2004.

LUTHER D. THOMAS
CLERK OF COURT

By: s/ [illegible]
Deputy Clerk

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED NOVEMBER 2, 2004

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 04-12206-BB

FRAN JONES,

Plaintiff-Appellant,

versus

ROCKDALE COUNTY, GEORGIA,

Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION (S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, ____ F.2d ____).

Before: BIRCH, DUBINA and PRYOR, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules

of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
UNITED STATES CIRCUIT JUDGE

APPENDIX E — AGREEMENT DATED SEPTEMBER 27, 1994

AGREEMENT

BY AND BETWEEN

DEPARTMENT OF TRANSPORTATION

STATE OF GEORGIA

AND

ROCKDALE COUNTY, GEORGIA

S.R. 20 from HONEY CREEK ROAD
to RELOCATED S.R. 138

THIS AGREEMENT, made and entered into this 27 day of September, 1994, by and between the DEPARTMENT OF TRANSPORTATION, an agency of the State of Georgia, hereinafter referred to as the "DEPARTMENT", and ROCKDALE COUNTY, GEORGIA, acting by and through its Chairman and Board of Commissioners, hereinafter referred to as the "COUNTY".

WHEREAS, the COUNTY has represented to the DEPARTMENT a desire to improve the roadway facilities along S.R. 20 from south of Honey Creek Road to Relocated S.R. 138; including the extension of the bridge culvert at Almond Branch, currently described as Georgia Department of Transportation Projects No. STP-0869(12), P.I. No. 730903, and BHS-0859(11), P.I. No. 730905, together hereinafter referred to as the "PROJECT"; and

WHEREAS, the COUNTY has represented to the DEPARTMENT a desire to participate in providing the design

needed for the improvements, purchase of right of way, relocating utilities, and other casts as specified in the Agreement, and the DEPARTMENT has relied upon, such representation; and

WHEREAS, the DEPARTMENT has indicated a willingness to participate in the funding of the construction for the PROJECT with funds of the DEPARTMENT, funds apportioned to the DEPARTMENT by the federal Highway Administration, hereinafter referred to as "FHWA", under Title 23, United States Code, Section 104, or a combination of funds from any of the above sources, subject to those certain conditions set forth in the Agreement.

NOW, THEREFORE, in consideration of the mutual promises made and of the benefits to flow from one to the other, the DEPARTMENT and the COUNTY hereby agree each with the other as follows:

1. The COUNTY shall contribute towards the PROJECT by funding the design engineering. The design engineering shall be accomplished in accordance with the DEPARTMENT's Plan, Development Process, the applicable guidelines of the American Association of State Highway and Transportation officials, and applicable guidelines of the DEPARTMENT. The design shall include, but not be limited to, the following items:

a. The COUNTY shall validate the concept using revised traffic furnished by the DEPARTMENT.

b. The COUNTY shall update the environmental document, if required, and shall perform the necessary

studies and prepare any required reevaluation for review by the DEPARTMENT. The DEPARTMENT shall submit the reevaluation for approval.

c. The COUNTY shall obtain all required additional surveys, mapping, and soil investigation studies needed for the design of the PROJECT.

d. The COUNTY shall prepare preliminary plans, final right of way plans, and final construction plans and specifications for the PROJECT, including any bridges. All plans and documents, except right of way plans, shall be in metric units. One of the goals of the design of the PROJECT shall be to minimize the construction cost.

e. The DEPARTMENT shall furnish design traffic, the approved concept and approved environmental report. Mapping and surveys in metric units will be provided in electronic format. Compatible with Microstation software. Metric-unit cross sections along the preliminary construction centerline will also be furnished in electronic format compatible with CEAL software.

f. The DEPARTMENT shall review and has approval authority for all aspects of the PROJECT. The DEPARTMENT will work with the FHWA to obtain all needed approvals with information furnished by the COUNTY.

2. Upon the COUNTY's determination of the rights of way required for the PROJECT and the approval of the right of way plans by the DEPARTMENT, the COUNTY shall acquire, at

it's cost, the necessary rights of way for the PROJECT, using funds of the DEPARTMENT. Right of way acquisition shall be in accordance with the rules and regulations of the FHWA including, but not limited to, Title 23 United States Code (Uniform Act) and 49 CFR Part 24 and the rules and regulations of the DEPARTMENT. Failure to follow these requirements will result in loss of Federal funding for the project and it will be the responsibility of the COUNTY to make up the loss of that funding. All rights of way will be cleared of obstructions, including underground storage tanks, by the COUNTY prior to the DEPARTMENT's final acceptance of the plans and specifications for the taking of bids for the PROJECT.

3. The COUNTY shall be responsible for all utility adjustments and relocation costs necessary for the construction of the PROJECT.

4. The COUNTY shall follow DEPARTMENT procedures for identification of existing and proposed utility facilities on the project. These Procedures, in part, require all requests for existing, proposed, or relocated facilities to flow through the District Utilities Engineer.

* * *

6. Upon completion and approval of the PROJECT plans, certification that all needed rights of way have been obtained and cleared of obstructions, and obtaining all needed permits (including Corps of Engineers 404) for the PROJECT by the COUNTY, the DEPARTMENT shall let the PROJECT for construction. Except as provided herein, the DEPARTMENT shall bear all costs associated with the actual construction

and inspection and materials testing during construction. The DEPARTMENT shall be solely responsible for securing and awarding the construction contract for the PROJECT.

7. This Agreement is made and entered into in Fulton County, Georgia and shall be governed and construed under the laws of the State of Georgia.

The covenants herein contained shall, except as otherwise provided, accrue to the benefit of and be binding upon the successors and assigns of the parties hereto.

IN WITNESS WHEREOF, the DEPARTMENT and the COUNTY have caused these presents to be executed under seal by their duly authorized representatives.

RECOMMENDED:

s/ Walker W. Scott, Jr.
Walker W. Scott, Jr.,
State Urban Design Engineer

s/ Hoyt J. Lively, Jr.
Hoyt J. Lively, Jr.
Director of Preconstruction

s/ Frank L. Danchetz
Frank L. Danchetz
Chief Engineer

DEPARTMENT OF TRANSPORTATION

Appendix E

BY: s/ Wayne Shackelford
Wayne Shackelford
Commissioner

ATTEST:

s/ [illegible]

REVIEWED 10-3-94
(Date)

s/ [illegible]
Legal – Transportation

BOARD OF COMMISSIONERS
ROCKDALE COUNTY

BY: s/ [illegible]
Chairman

Signed, sealed and delivered
this 27 day of September,
1994, in the presence of:

s/ [illegible]
Witness

s/ [illegible]
Notary Public
Notary Public, Rockdale County, Georgia
My Commission Expires October 27, 1997

Appendix E

This Agreement approved by the
ROCKDALE COUNTY Commission at
a meeting held at Rockdale
the 27 day of September, 1994.

s/ [illegible]
County Clerk